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In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. What is the appropriate standard to be applied when determining whether the "fundamental miscarriage of justice" exception, *Smith v. Murray*, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition?

2. Under the standard to be used when determining whether the "fundamental miscarriage of justice" exception set forth in *Smith v. Murray*, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition, should the focus be strictly on the defendant's legalistic "eligibility" to be sentenced to death, and fail to require a fact-based examination of the accuracy of the jury's decision, including whether: (i) the jury was presented with false facts; and (ii) the jury was *not* presented with true, mitigating facts?

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CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 945 F.2d 812 (5th Cir. 1991), and is reproduced in the Joint Appendix (JA) at 309-338. The court modified the third paragraph, Section II.E., of the opinion on November 12, 1991. It is reproduced in Appendix B.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana is reported at 772 F.Supp. 297 (E.D. La. 1991), and is reproduced at JA 284-308.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 10, 1991 and modified on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eighth Amendment, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different

grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The case also involves the following Louisiana statutes, which are reprinted in Appendix A:

Louisiana Revised Statute 14:30.

Louisiana Revised Statute 14:30.1.

Louisiana Code of Criminal Procedure, Article 905.2.

Louisiana Code of Criminal Procedure, Article 905.4.

Louisiana Code of Criminal Procedure, Article 905.5.

Louisiana Code of Criminal Procedure, Article 905.6

Rules of the Supreme Court of Louisiana, Rule 28.

STATEMENT OF THE CASE

i. Course Of The Proceedings[1]

Mr. Sawyer's conviction of first degree murder and sentence of death were affirmed on direct appeal. *State v. Sawyer*, 422 So.2d 95 (La. 1982). On application for writ of certiorari, the Court vacated the sentence and remanded the case in light of *Zant v. Stephens*, 462 U.S. 862 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223 (1983). On remand, the court affirmed the conviction and sentence. *State v. Sawyer*, 442 So.2d 1136 (La. 1983).

Mr. Sawyer sought collateral review in state court. The Louisiana Supreme Court remanded the case to the state district court twice for hearings on ineffective assistance of counsel. *State ex rel. Sawyer v. Maggio*, 450 So.2d 355 (La.

[1] References in this brief are being made to the following: record on appeal in the Court of Appeals as "R"; Joint Appendix as "JA"; trial record as "TR"; and state post conviction hearing as "SH".

1984); *State ex rel. Sawyer v. Maggio*, 468 So.2d 554 (1984). Ultimately, the supreme court denied discretionary review by a vote of 4 to 3. *State ex rel. Sawyer v. Maggio*, 479 So.2d 360 (La. 1985).

Mr. Sawyer then filed a writ of habeas corpus in the United States District Court on January 20, 1986, wherein numerous issues were raised including a broad based claim of ineffective assistance of trial counsel. In support of the claim that trial counsel failed to provide effective assistance in the penalty phase, prior habeas counsel submitted her affidavit which listed the names and addresses of five family members who "could have provided" trial counsel with information, and noted that Mr. Sawyer had been "confine[d] at the State Mental Hospital in Bolivar, Tennessee, where he received shock treatments and drugs."[2]

The district court denied the writ without an evidentiary hearing, agreeing with the findings of the magistrate. On this issue, the magistrate found, "Without specific allegations of the expected testimony of the [five identified individuals] and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice," JA 109, and noted that because "[p]etitioner does not furnish us any medical records connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime, [and] does not claim he was treated for or suffered from any mental condition since that earlier hospitalization . . . petitioner has not established prejudice." JA 113.

Mr. Sawyer raised three issues on appeal, i.e., ineffective assistance of counsel, that a violation of state law deprived him of equal protection and due process,[3] and a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), error. A divided panel affirmed the denial. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir.

[2] Exhibit "S", Petition for Writ of Habeas Corpus, *State v. Blackburn*, No. 86-0223, Eastern District of Louisiana.

[3] The state law requires appointed counsel in capital cases to have been admitted to the bar for at least five years. La. Code Crim. Proc. Ann. Art. 512 (West 1984). Mr. Sawyer's trial counsel was admitted to the bar less than two years when the case went to trial. SH 138.

1988).[4] The court granted rehearing *en banc*,[5] and ruled against Mr. Sawyer. *Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. 1989).

This Court granted certiorari and affirmed the Court of Appeal's decision. *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822 (1990).

Mr. Sawyer filed a second habeas corpus petition in the district court on October 8, 1990 and amended the petition on December 6, 1990 by adding a claim. All claims were fully exhausted. On July 16, 1991, the district court dismissed the petition, *Sawyer v. Whitley*, 772 F.Supp. 297 (E.D. La. 1991),[6] and declined to issue a certificate of probable cause. The Court of Appeals granted a certificate of probable cause to appeal, and affirmed the district court's denial. *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991). Thereafter, the court denied rehearing and rehearing *en banc*.

The second petition raised one claim which had been raised in the previous petition, i.e., that trial counsel's failure to investigate and present evidence of mitigation was ineffective assistance of counsel. The petition also raised two new claims: that the state withheld exculpatory evidence and that Mr. Sawyer was incompetent to stand trial.[7]

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[4] Regarding the issue of ineffective assistance of counsel at the penalty phase, the court stated, "Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. . . . Sawyer neither describes the substance of [the] potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law." 848 F.2d at 587. (Mr. Sawyer's brother-in-law did not testify at the penalty phase).

[5] The *en banc* issue involved the application of *Caldwell v. Mississippi* in light of *Teague v. Lane*, 489 U.S. 288 (1989).

[6] The district court found that the relevant claims either constituted abuse of the writ or were successive claims.

[7] Mr. Sawyer alleged that the question of competency to proceed was unconstitutionally resolved due to the cursory and incomplete evaluations performed by the sanity commission members.

ii. Material Facts

At 7:00 a.m. on September 28, 1979, Robert Sawyer, Charles Lane and Cindy Shano returned home after a night of bar-hopping and drinking. Mr. Sawyer lived with Shano and her two sons. They had left the children with Frances Arwood, the victim and friend of Shano's, the night before, and had encountered Lane in one of the bars they visited that night. When they arrived home, all were drunk: "They were staggering. They couldn't get up the steps." R 1326.

Shano, the state's star witness, claimed that she left Mr. Sawyer during the evening and did not meet Lane until he arrived at her home with Mr. Sawyer the next morning where they continued drinking. TR 1174. She denied drinking alcohol. TR 1198. She stated that she left her home at about noon to use the telephone, and when she returned, Arwood's mouth was bleeding. TR 1145. At this point, Shano said that Lane and Mr. Sawyer began beating Arwood, and eventually, Arwood was set on fire.[8] TR 1151-52. Shano admitted not witnessing the burning but stated that Lane and Mr. Sawyer told her Mr. Sawyer set Arwood on fire. *Id.* The state also presented evidence of a lighter fluid can bearing Mr. Sawyer's fingerprints. TR 1310.[9]

Mr. Sawyer admitted to police that he beat Arwood after he became angry since it appeared that one of the children had been drugged. TR 1274-75.[10] One of the children told him that Arwood had given drugs to the other child. *Id.* Sawyer accused Lane of setting Arwood on fire, (TR 1276) and Lane,

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[8] Arwood died nearly two months later as a result of burns and brain damage from head injury. TR 1080.

[9] The state offered Mr. Sawyer the opportunity to plead guilty to first degree murder and receive a life sentence. SH 15; 72.

[10] Two doctors were appointed by the court to examine Mr. Sawyer for competency to stand trial. They both reported that Mr. Sawyer told them he believed the child had been drugged by Arwood. JA 342, 345.

while admitting to raping Arwood, accused Sawyer of setting the fire. *See State v. Lane*, 414 So.2d 1223, 1225 (La. 1982).

Mr. Sawyer's defense was the inability to form specific intent due to intoxication. *See* La. Rev. Stat. Ann. 14:15 (West 1986). He presented the two doctors who were appointed to the sanity commission and lay witnesses in support of his defense. Each doctor testified based upon Mr. Sawyer's self-reported alcohol ingestion that he suffered from "toxic psychosis" and could not form the requisite intent at the time of the offense. JA 439, 475.

On cross-examination, Dr. Arneson testified that Mr. Sawyer is probably a sociopath. JA 472. She also gave testimony regarding the nature and characteristics of sociopathic persons: sociopaths have great problems conducting themselves according to the rules of society, have no guilt or remorse, will kill for their own benefit and "will do whatever they think they can get away with." JA 478-480.

Dr. DeVillier testified on cross-examination that it "would be more likely" that the crime was committed by a person with a sociopathic personality. JA 465. He also discussed the character of individuals with a sociopathic personality. JA 463-465.

The state argued that Mr. Sawyer was guilty of aggravated rape and aggravated arson.[11] Mr. Sawyer's counsel waived closing argument. TR 1451.

After waiving an opening statement at the penalty phase, defense counsel presented the testimony of Mr. Sawyer's sister, Glenda White, her son, Glenn White,[12] and Mr. Sawyer. White noted that her father was a strict disciplinarian who instilled the value of hard work in Mr. Sawyer, and stated that

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[11] Mr. Sawyer's conviction for first degree murder is based upon a finding of aggravated arson. Aggravated arson was also found as an aggravating circumstance by the jury at the sentencing phase. Aggravated rape was not found. *State v. Sawyer*, 422 So.2d at 99 n.8.

[12] Glenn White briefly testified that Mr. Sawyer took him to the park and movies, and played baseball with him. JA 520.

Mr. Sawyer could not engage in normal childhood recreational activities due to his work on the family farm. JA 507-508. She stated that she had left the household when Mr. Sawyer entered adolescence. JA 507. The jury learned that Mr. Sawyer had a propensity for running away from home and had been hospitalized.[13]

In the second habeas corpus petition, Mr. Sawyer presented evidence that is highly material to the appropriateness of the guilty verdict and death penalty. This evidence includes records of three mental health hospitalizations, school records, and reports of recent neurological and psychiatric evaluations.[14] These records and reports demonstrate that Mr. Sawyer's mental disabilities, mental retardation and frontal lobe damage limit the degree of his moral culpability and blameworthiness and establish that he is not a sociopath. In addition, Mr. Sawyer presented affidavits which cast grave doubt on his involvement in the aggravated arson.

Mr. Sawyer has an IQ of 68. JA 566. His mental retardation was first detected as a young child. After twice failing the first grade he was "socially promoted" and then placed in EMR (Educable Mentally Retarded) classes. R 231-233. He has the learning ability of a third or fourth grade student. JA 549.

As a teenager, he was diagnosed as both moderately and mildly mentally retarded, and as suffering from chronic brain syndrome with schizophrenic reaction. JA 537-540. Recent neurological, psychiatric and psychological evaluations corroborate the previous diagnoses; he suffers from Organic Personality Syndrome and mental retardation. JA 544-545, 548, 566. The experts believe that Mr. Sawyer has a "severely impaired ability" for reflective or abstract thinking, that his judgment is "grossly defective" and that his ability to control his impulses is "severely limited" due to prefrontal lobe brain

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[13] White stated, "because of his running away . . . they put Robert in the State Mental Hospital for no reason and they gave him drugs." JA 509.

[14] *See*, prior mental health records, JA 537-540, R 180-226; school records, R 228-34; and mental health evaluations, JA 541-568.

damage. JA 545, 547, 554. These evaluators concluded that Mr. Sawyer's organic impairment is probably attributable to repeated trauma to his central nervous system during his childhood years, including four documented occasions of unconsciousness due to head injuries and his mother's attempt to suffocate him when he was an infant. JA 544, 551-552.

Mr. Sawyer also presented evidence showing that the state withheld vital exculpatory evidence at trial. Shano's four year old son witnessed the burning of Arwood, and told a detective that Lane set fire to Arwood and that Mr. Sawyer attempted to prevent Lane from doing so. JA 587. Evidence was also presented showing that Shano was granted immunity in exchange for her testimony against Mr. Sawyer. JA 591-592, 596-597, 603. The facts proffered in the habeas corpus petition are more fully discussed in Argument III, *infra*.

SUMMARY OF ARGUMENT

While the Court has declined to delineate the precise contours of the "fundamental miscarriage of justice" exception to the cause-and-prejudice requirement as it applies to capital cases, *Smith v. Murray* and other precedents establish certain primary requirements that any definition of "death innocence" must respect. Most importantly, the underlying constitutional error must implicate the petitioner's actual, as opposed to legal innocence. This means that the error must preclude the development of true facts or result in the admission of false facts. Under *Smith*, a fundamental miscarriage of justice occurs when the error forecloses the presentation of mitigating evidence crucial to the petitioner's moral culpability.

Errors in the observance of constitutional exclusionary rules and other prophylactic safeguards that do not bear on the actual culpability of the individual petitioner do not generate miscarriages of justice. The miscarriage doctrine thereby isolates only the rare case since it is limited to fact-based errors so significant that, had they not occurred, the jury would probably have concluded that the balance of

aggravating and mitigating factors would not have warranted death.

The Fifth Circuit misconstrued *Smith* and fashioned its own radical and inequitable test, under which a petitioner is death-innocent only if he *could not*, but not if he *would not* have been sentenced to death absent the error. The Fifth Circuit's "eligibility" test rests on the incorrect premise that *Kuhlmann v. Wilson* and this Court's other non-capital miscarriage cases hold that a petitioner must establish that he would have been ineligible for a conviction absent the error.

The Fifth Circuit's test vastly exaggerates the relationship between a valid aggravating circumstance and the accuracy of a death sentence. As a construction of death-innocence, the concept of death-eligibility ignores the Eighth Amendment's core concern of individualized capital sentencing and discards the rule of *Locket v. Ohio* as irrelevant. A death-eligibility test will not protect true victims of miscarriages of justice.

Under the appropriate miscarriage standard, Robert Sawyer is innocent of the death penalty because he would not have been sentenced to death had the sentencer not been presented with a grossly inaccurate sentencing profile. Relying on the testimony of a court-appointed psychiatrist, Sawyer's own lawyer told the jury that he was probably a sociopath. This was a highly inaccurate and prejudicial diagnosis, as counsel would have discovered had he retrieved the psychiatric records from Sawyer's three commitments to mental institutions. Those records, presented for the first time in Sawyer's second habeas petition, document diagnoses of mental retardation, organic brain damage, schizophrenia, and a history which includes an abnormal EEG, electroconvulsive therapy and anti-psychotic medication. Although his client had been institutionalized because he had been adjudged incompetent, trial counsel presented false evidence that Sawyer had been hospitalized for no reason.

The State's suppression of favorable evidence concerning Sawyer's involvement in the aggravated arson further distorted the sentencing profile. Moreover, since this evidence

casts doubt on his guilt of first degree murder, Sawyer is entitled to relief even under the Fifth Circuit's test.

Robert Sawyer is the victim of a fundamental miscarriage of justice. He has a right to a hearing on the claims contained in his second habeas petition.

ARGUMENT

I. THE FUNDAMENTAL MISCARRIAGE OF JUSTICE DOCTRINE PERMITS CONSIDERATION OF A CLAIM CONTAINED IN A SUCCESSIVE HABEAS PETITION UPON A SHOWING THAT THE PRISONER WAS SENTENCED TO DEATH BECAUSE THE SENTENCER CONSIDERED FALSE EVIDENCE OR BECAUSE THE SENTENCER WAS DEPRIVED OF CONSIDERING TRUE EVIDENCE CRITICAL TO THE PRISONER'S CULPABILITY.

The fundamental miscarriage of justice doctrine is a narrow exception to the rule that, absent a showing of cause-and-prejudice, a petitioner is not entitled to consideration of claims presented in a second habeas corpus petition.

While the Court has declined to delineate the precise contours of the fundamental miscarriage of justice standard as it applies to capital cases, the Court's precedents establish certain primary considerations that any acceptable standard must embrace. These include: (1) that the sentencer was seriously misled because it either (a) considered false aggravating facts or (b) was deprived of considering true mitigating facts, and (2) that there is a probability that, absent the error, the sentencer would have concluded that a death sentence was not appropriate.

A. The Fundamental Miscarriage Of Justice Doctrine Mandates Consideration Of Successive, Abusive Or Defaulted Claims Supplemented With A Showing Of Factual Innocence.

The contours of the miscarriage of justice standard began to emerge in a series of decisions beginning with *Kuhlmann v.*

Wilson, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986). These decisions began the Court's effort to define the extraordinary circumstances under which prisoners filing habeas corpus petitions[15] presenting successive, abusive or defaulted claims are entitled to a merits ruling despite their inability to show cause-and-prejudice for the default or writ abuse.[16]

In *Kuhlmann v. Wilson*, the prisoner filed a second habeas corpus petition presenting a claim previously considered and decided on the merits. A plurality of the Court announced that, "[i]n light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction," federal courts are required "to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[17] 477 U.S. at 454.

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[15] 28 U.S.C. Section 2254.

[16] "The terms 'successive petition' and 'abuse of the writ' have distinct meanings." *Kuhlmann*, 477 U.S. at 445, n.6. *See Sanders v. United States*, 373 U.S. 1, 15-17 (1986). "Successive petitions" raise grounds identical to those previously raised and decided on the merits. *Kuhlmann*. Petitions which allege new grounds, not previously raised, constitute an "abuse of the writ." *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991); *See* Rule 9(b) of the Rules Governing Section 2254 Cases. A procedurally defaulted claim is one which was not properly raised in the state forum. *Carrier*. Despite their distinct meanings, the Court has decided "that the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context." *McCleskey*, 111 S.Ct. at 1454. "The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse of the writ inquiry. . . . " *Id.* at 1470. However, "[i]f a petitioner cannot show cause, the failure . . . may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 1470.

[17] The Court's standard was drawn from an article written by Judge Friendly, who proposed that Congress reform habeas corpus practice by

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The Court in *Kuhlmann* drew a clear distinction between factual innocence and legal innocence, specifically stating that the reviewing court must assess the claim "in light of all the evidence" available to it. *Id.* at 454 n.17 (quoting Friendly, *supra*, at 160). Kuhlmann's underlying constitutional claim alleged a violation of the Court's holding in *Massiah v. United States*, 377 U.S. 201 (1964). The Court noted that "[t]he constitutional claim argued by [the prisoner] does not raise any question as to his guilt or innocence," because a *Massiah* violation is a *legal* error which does not result in the admission of false facts or the absence of true facts. 477 U.S. at 455. Since Kuhlmann failed to supplement his underlying constitutional claim with a showing of factual (as opposed to legal) innocence, the plurality found that the Court of Appeals should have dismissed the petition. *Id.*

In *Murray v. Carrier*, the Court extended the availability of its narrow innocence exception to prisoners whose petitions include defaulted claims and who are unable to demonstrate cause-and-prejudice. The Court provided that a petitioner would be entitled to habeas relief even absent a showing of cause for the procedural default "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* Carrier's petition for review of his defaulted discovery claim was remanded for dismissal "unless it is determined on remand that the victim's statements contain material that would establish [Carrier's] actual innocence." 477 U.S. at 497.

In a more recent case, *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1451 (1991), the Court re-emphasized the critical importance of the distinction between actual and legal innocence. Although his *Massiah* claim had not been presented in

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requiring a showing of factual innocence as a prerequisite for habeas review generally. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970); *Kuhlmann*, 477 U.S. at 455.

his first habeas petition, McCleskey argued that he was nonetheless entitled to a merits ruling to prevent a miscarriage of justice. The Court noted that the miscarriage of justice doctrine "require[s] federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.' " 111 S.Ct. at 1471, quoting *Kuhlmann*, 477 U.S. at 455.

McCleskey, though, was not entitled to protection of the miscarriage of justice exception because, like Kuhlmann, he was unable to demonstrate that the underlying error resulted in the admission of false incriminating evidence. "The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence. . . . McCleskey cannot demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person." *Id.* at 1475.

McCleskey, then, reaffirmed precedent of this Court, holding squarely that, when the conviction is under attack, the miscarriage of justice exception is unavailable unless the petitioner's constitutional claim implicates his actual, not legal, innocence.

B. The Fundamental Miscarriage Of Justice Doctrine Mandates Consideration Of Successive Capital Sentencing Claims Supplemented With A Showing That The Sentencer Considered False Evidence Or Was Deprived Of Considering True Evidence Crucial To Culpability.

The Court first considered the application of the fundamental miscarriage of justice exception to the penalty phase of a capital murder proceeding in *Smith v. Murray*. In *Smith*, the petitioner contended that the introduction at the penalty phase of his truthful statements to a court-appointed psychiatrist violated his Fifth Amendment rights because he did not receive his *Miranda* warnings.[18]

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[18] During the course of the psychiatric examination, Smith reported that "he had once torn the clothes off a girl on a school bus before

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Acknowledging that the concept of "actual," as distinct from "legal," innocence "does not translate easily into the context of an alleged error at the sentencing phase of a capital offense," *Smith*, 477 U.S. at 537, the Court enforced the procedural default for two reasons. First, there was "no allegation that the testimony was false or in any way misleading." *Id.* at 538. Second, there was no support for an allegation that the psychiatrist's role in the prosecution "had the effect of foreclosing meaningful exploration of psychiatric defenses." *Id.* The Court concluded that, "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.* The Court rested its holding on the undisputed fact that the admission of the constitutionally-tainted, yet truthful, testimony "did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society."[19] *Id.* (emphasis in original).

Read together, *Kuhlmann*, *Carrier*, *McCleskey* and *Smith* restrict the availability of the miscarriage of justice doctrine to the rare capital case where a constitutional error has resulted in the admission of false evidence or where the error has deprived the jury of true exculpating or mitigating evidence.

In a subsequent case applying the miscarriage of justice doctrine to a capital sentencing proceeding, the Court continued to focus on whether the alleged constitutional error resulted in the admission of false facts or precluded the

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deciding not to rape her." 477 U.S. at 531. The court-appointed psychiatrist failed to inform Smith that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired. *Id.*

[19] Smith's "jury had relied on two distinct aggravating factors in its decision to recommend the death penalty." *Smith*, 477 U.S. at 533 (addressing opinion of court of appeals). The psychiatric testimony addressed "the likelihood that petitioner would 'constitute a continuing serious threat to society.' " *Id.* (citations to Virginia statute omitted). Smith did not challenge the other statutory aggravating factor. *Id.*

admission of true mitigating facts. *Dugger v. Adams*, 489 U.S. 401 (1989), concerned a defaulted *Caldwell* claim.[20] The Court rejected the petitioner's argument that the very nature of the instructional error established that the sentencing determination was inaccurate. "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." 489 U.S. at 410 n.6. Thus, defects in the procedures designed to ensure the integrity of a death sentence do not amount to a miscarriage of justice in the absence of a factual showing that the individual petitioner's sentence is unwarranted when the defects are corrected.

In short, the petitioner must show that he was sentenced to death because the sentencer considered false evidence, or because the sentencer was deprived of considering mitigating evidence crucial to the petitioner's culpability.[21]

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[20] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

[21] Perhaps the best workable synthesis of the principles which emerge from the Court's precedents is Judge Anderson's formulation: "The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of 'cause,' where the alleged constitutional error has resulted in a *factually inaccurate sentencing profile*. . . . " *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (*in banc*) (Anderson, J., dissenting) (emphasis added). "[T]he standard I propose reflects the common sense meaning of the language used by the several applicable Supreme Court decisions." *Id.* Indeed, this Court has used identical language in evaluating a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 699-701 (1984) ("The evidence that respondent says his trial counsel should have offered at the sentencing hearing *would barely have altered the sentencing profile* presented to the sentencing judge") (emphasis added).

C. The Fundamental Miscarriage Of Justice Doctrine Will Not Allow For Consideration Of Successive Claims Unless There is a Probability That, Absent The Fact-Based Error, The Jury Would Have Concluded That A Death Sentence Was Not Warranted.

A repeat capital habeas petitioner is not entitled to merits review of his claim merely because the claim resulted in the presentation of false facts or the absence of true mitigating facts. The petitioner must also demonstrate that the factual inaccuracy impacted on the sentencing determination. Thus, a constitutional error which results in either the introduction of inconsequential false evidence, or the absence of inconsequential mitigating evidence, will not produce a fundamental miscarriage of justice.

In *Kuhlmann v. Wilson*, a plurality of the Court determined that the "ends of justice"[22] require federal courts to entertain claims advanced in successive habeas petitions only where the prisoner supplements his claim with a "colorable showing" of factual innocence. 447 U.S. at 454. Drawing from Judge Friendly's proposal, *Kuhlmann* provided that a prisoner could make the requisite showing only by demonstrating "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt about his guilt." 477 U.S. at 454 n.17 (quoting Friendly, *supra*, at 160). Thus, to remain faithful to *Kuhlmann*, any death-innocence claim would be scrutinized under the "fair probability" standard.

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[22] Drawing on language contained in the habeas statute then in effect, *Sanders v. United States*, 373 U.S. 1, 15-17 (1963) held that a federal court must decide if the "ends of justice" require consideration of a successive petition. *See* 28 U.S.C. Sec. 2254 (1964 ed.). *Kuhlmann* held that this inquiry remained appropriate even though the operative language was deleted from the 1966 revision to the habeas enactment. 477 U.S. at 451. After recognizing that the fundamental miscarriage of justice exception "gives meaningful content to the otherwise unexplained 'ends of justice' inquiry" mandated by *Sanders*, the Court in *McCleskey* embraced the *Kuhlmann* plurality's "factual innocence" inquiry as the central source of this content. 111 S.Ct. at 1471.

As *Kuhlmann* involved a challenge to a conviction, the Court announced a test appropriate to that context – whether the jury would have entertained a reasonable doubt about guilt. In the context of a capital sentencing proceeding, however, this analysis has limited utility. The appropriate standard would assess whether, absent the error, there is a fair probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[23] This standard remains faithful to *Kuhlmann* where possible (fair probability) but incorporates *Strickland*'s more appropriate penalty phase inquiry into the balance of aggravating circumstances.

D. The Fundamental Miscarriage Of Justice Exception Is Limited To The Rare And Exceptional Capital Case.

The fundamental miscarriage of justice exception is limited to the rare and exceptional capital case by several restrictions. First, mere legal errors do not produce miscarriages of justice. This is true even in close cases. *Dugger v. Adams*, 489 U.S. at 410 n.6 (instructional error insufficient to excuse default even though sentencer found equal number of aggravating and mitigating circumstances). Thus, constitutionally deficient jury instructions, improper penalty phase prosecution argument, issues relating to jury bias, and other common genres of capital trial error simply do not generate miscarriages of justice.

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[23] The Court recognized as much in *Strickland v. Washington*, when it formulated two distinct tests for assessing the effect of deficient legal representation at the liability and penalty phase. The guilt phase test, which closely parallels the *Kuhlmann/McCleskey* standard set forth above, focuses on whether the jury would have entertained a reasonable doubt about guilt absent counsel's errors. The penalty phase inquiry is tailored to the penalty phase context. It focuses on whether, absent the error, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 696.

Second, errors in the observance of constitutional exclusionary rules and other prophylactic safeguards that do not bear on the actual culpability of the individual petitioner do not generate miscarriages of justice. *McCleskey v. Zant*, *supra*; *Smith v. Murray*, *supra*. Rather, the constitutional error must have either produced false evidence or precluded the development of true evidence.[24]

Claims of ineffective assistance of counsel, consequently, would not produce miscarriages of justice if the incompetence complained of did not result in the presentation of false evidence or the failure to present true mitigating evidence. In short, only a very small subset of *Strickland* Sixth Amendment errors will constitute a fundamental miscarriage of justice.[25]

Further, the fundamental miscarriage of justice exception is not satisfied unless there is a "fair probability" that the admission of false evidence, or the preclusion of true mitigating evidence, resulted in a sentence of death.[26] *Kuhlmann*, 477 U.S. 454 n.17 (quoting Friendly, *supra*, at 160). This requirement "would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention. . . . " Friendly, *supra*, at 150.

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[24] The "innocence of death" concept does not create a new species of federal constitutional error. Rather, it serves as an important screen to isolate the rare successive, abusive or defaulted claim which adequately demonstrates that the sentencer considered false evidence or was precluded from considering true mitigating evidence crucial to culpability.

[25] Of course, proving that ineffective assistance of counsel resulted in the admission of material false evidence or in the preclusion of crucial mitigating evidence would only entitle the petitioner to a ruling on the Sixth Amendment claim.

[26] As indicated *supra*, the Court in *McCleskey* reaffirmed the *Kuhlmann* "colorable showing of factual innocence" standard. 111 S.Ct. at 1471. However, Sawyer prevails not only under this standard, but also under either the more restrictive "more likely than not" standard suggested by the *Johnson* dissent 938 F.2d at 1200, or the "more probable than not" standard adopted by the Ninth Circuit. *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991). *See Argument III*, *infra*.

Finally, a reviewing court need not wrestle with the question of whether the underlying error in fact produced false evidence or foreclosed the development of mitigating evidence "[i]f it is easier to dispose of [such a] claim on the ground of a lack of sufficient prejudice. . . . " *Strickland v. Washington*, 466 U.S. at 697.

In sum, a fundamental miscarriage of justice will only arise in an exceptional case under the Court's precedents, since (1) generic errors in constitutional rules of procedure, no matter how inherently prejudicial, do not create miscarriages of justice; (2) constitutionally inadmissible but truthful evidence does not create a miscarriage of justice; (3) only errors which result in (a) the consideration of false evidence or (b) the preclusion of true mitigating evidence create miscarriages of justice; and (4) even then, a miscarriage of justice results only if there is a probability that the jury would not have imposed death.

II. THE FIFTH CIRCUIT'S RIGID "ELIGIBILITY" TEST IS CONTRARY TO THIS COURT'S PRECEDENTS AND UNFAITHFUL TO THE EIGHTH AMENDMENT'S CORE CONCERN OF INDIVIDUALIZED SENTENCING.

Instead of resolving Sawyer's miscarriage of justice claim pursuant to the standards developed by this Court (see Argument I, *supra*), the Fifth Circuit fashioned its own radical and inequitable "eligibility"[27] standard in dismissing the

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[27] The Fifth Circuit does not use the term "eligibility" when describing its miscarriage of justice test, referring instead to the "authority" to entertain a death sentence. 945 F.2d at 820. However, the Fifth Circuit's test is virtually identical to the standard of the majority opinion in *Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991) (*in banc*). Because the Fifth Circuit relies heavily on *Johnson*, because in *Johnson* the Eleventh Circuit itself notes that its standard "is tied to eligibility," 938 F.2d at 1183, and because the term accurately describes both tests, the Fifth Circuit's standard will be referred to *infra* as an "eligibility" test. It should be noted, though, that the Eleventh Circuit test gauges eligibility

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petition. The Fifth Circuit's standard is seriously flawed. First, it is unfaithful to this Court's precedents. Second, it completely misconstrues the relationship between the existence of a valid aggravating circumstance and the appropriateness of a death sentence. Finally, the standard offends both the Eighth Amendment's core concern of individualized sentencing and the equitable principles that animate the Writ of Habeas Corpus.

A. The Fifth Circuit's Test Is Unfaithful To Supreme Court Precedents.

The Fifth Circuit's standard is as follows:

> Translating *Kuhlmann*'s guilt-innocence phase test to the sentencing phase, then, we must require a petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. . . .
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> * * *
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> That is, a petitioner is not actually innocent of the death penalty unless he demonstrates, under all the evidence that was and arguably should have been presented, that the jury would not have been authorized to sentence him to death.

Sawyer, 945 F.2d at 820 (footnotes omitted).

The Fifth Circuit's "eligibility" test is predicated on a misreading of this Court's most extensive treatment of the miscarriage of justice exception in a capital case. *Smith v. Murray*, 477 U.S. 527 (1986). In attempting to rationalize its radical standard, the Fifth Circuit contended that: "[i]n dismissing Smith's claim, the Court *seems to have implied* that a

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without regard to state law prerequisites for imposing the death penalty while the Fifth Circuit test looks to state law requirements as well. *Sawyer*, 945 F.2d at 820 n.13.

claim that challenged only one aggravating circumstance was 'unrelated to [actual] innocence,' and thus failed to present the risk of a fundamental miscarriage of justice." 945 F.2d at 818 (citations omitted) (emphasis added). It is true that the petitioner in *Smith* challenged only one of two statutory aggravating circumstances. However, this Court's analysis of Smith's miscarriage of justice contention demonstrates that the failure to challenge all aggravating factors was in no manner dispositive of the claim.[28]

The fact is that, in *Smith*, the Court stated in no uncertain terms that a miscarriage of justice results when the accuracy of the sentencing determination is undermined by an error which precludes the development of mitigating evidence. In rejecting Smith's miscarriage of justice contention, the Court specifically found that the error did not have "the effect of foreclosing meaningful exploration of psychiatric defenses." *Smith*, 477 U.S. at 538. This observation can only mean that an error which does in fact foreclose the development of crucial mitigating psychiatric testimony constitutes a miscarriage of justice.

By observing that, "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones[,]" the Court clearly rejected any standard that ignores mitigating evidence. *Smith*, 477 U.S. at 538. The Court's observation about "true facts" makes no sense unless it refers to true *mitigating* facts; only this interpretation of *Smith* is faithful to the decision's

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[28] As Chief Judge Tjoflat observed:

> 'Had the Supreme Court intended to adopt an eligibility test, it would merely have noted the existence of the untainted aggravating circumstance, concluded that the defendant was still eligible for the death penalty, and thus found that the miscarriage of justice standard was not satisfied' . . . I agree with Judge Anderson that *Smith*, as well as *Adams*, undermines the court's eligibility test. . . .

Johnson v. Singletary, 938 F.2d at 1193 n.15 (Tjoflat, C.J., concurring and dissenting) (quoting Anderson, J., dissenting at 1199).

unvarying emphasis on the impact of inaccurate evidence[29] on the jury's deliberations[30] and verdict.[31] "In other words, in *Smith*, the Supreme Court focused on the accuracy of the sentencing determination." *Johnson*, 938 F.2d at 1196 (Anderson, J., dissenting).

The Fifth Circuit misconstrued not only *Smith*, but also *Dugger v. Adams*, 489 U.S. 401 (1989), and *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454 (1991), both of which reiterate that a repeat habeas petitioner must augment his or her constitutional claim with a challenge to the accuracy of the evidence, and not simply the reliability of the verdict. Discussing both cases, the Fifth Circuit states:

> In cases following *Smith*, the Supreme Court has continued to adhere to the view that actual innocence requires more than showing a constitutional error, *even one that results in the admission of false or misleading facts*, and even if the verdict or sentence would have been different absent the error.

945 F.2d at 818 (emphasis added). *Adams* and *McCleskey do* hold that actual innocence requires more than a showing of constitutional error, even if the verdict or sentence would have been different absent the error. But the Fifth Circuit's suggestion that these cases dealt with false or misleading facts is simply in error. Neither petitioner pressed claims which involved the admission of false or misleading facts,[32]

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[29] Testimony not "false or in any way misleading." 477 U.S. at 538.

[30] Error "did not serve to pervert the jury's deliberations. . . . " 477 U.S. at 538.

[31] There is nothing unfair about enforcing default rules "in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U.S. at 538.

[32] The Fifth Circuit's observation that *Adams* clarifies "that the Court did not intend *Smith* to stand for the converse proposition – that the admission of false facts or the omission of true facts would end the inquiry into whether a petitioner was innocent of the death penalty[,]" 945 F.2d at 821 n.16, is simply untrue, for Adam's claim did not implicate the accuracy of the evidence before the jury. Moreover, Sawyer

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and, indeed, both decisions emphasized that the admission of false or misleading evidence *can* demonstrate "actual innocence" of the death penalty. *See supra*.

B. The Fifth Circuit's Eligibility Test Rests On A Misreading Of *Kuhlmann* And A Misunderstanding Of The Origin And Nature Of The Actual Innocence Exception To Successive And Abusive Petitions.

1. *Jackson v. Virginia* Has No Bearing On The Determination Of Whether A Petitioner Has Supplemented His Constitutional Claim With A Colorable Showing Of Actual Innocence.

According to the Fifth Circuit, *Jackson v. Virginia*, 433 U.S. 307 (1979), is the foundation of this Court's actual innocence doctrine as an exception to writ abuse: "*Jackson v. Virginia*, which provided the foundation for the *Kuhlmann* test, carefully limited the role of courts in conducting a sufficiency of the evidence review." 945 F.2d at 821. *See also id.* at 817 ("The *Kuhlmann* plurality drew from . . . *Jackson v. Virginia*. . . . ").

In fact, the *Kuhlmann* plurality opinion itself does not contain a *single* citation to *Jackson v. Virginia*. *Kuhlmann* neither "drew from" *Jackson*, nor used it as the "foundation" for developing its factual innocence test. This Court's opinion in *Jackson* has nothing to do with an assessment of whether a repeat habeas petitioner has supplemented his claim of constitutional error with a colorable showing of actual innocence. The Fifth Circuit's incorporation of the *Jackson* sufficiency of the evidence test into its standard for reviewing claims of

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does not contend that such a showing would *end* the inquiry into the question of death-innocence. A petitioner would never be entitled to a merits ruling on a claim that was not supplemented with a strong showing that the error precluded the development of *crucial* mitigating evidence or resulted in the admission of *material* false evidence.

"actual innocence of death" betrays a serious misunderstanding of the purpose, nature, and consequences of an inquiry into a repeat habeas petitioner's factual innocence.

Jackson v. Virginia holds that the Due Process Clause "prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." 443 U.S at 309 (citing *In re Winship*, 397 U.S. 358 (1970)). *Jackson* fashioned a standard for reviewing insufficiency claims which "impinges on jury discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. A reviewing court does not make its own subjective determination of guilt or innocence since to do so would constitute a forbidden incursion into jury discretion.

The miscarriage of justice doctrine serves a completely different purpose. The integrity of the evidence is analyzed not to determine whether the jury based a conviction on an insufficient foundation, but to isolate those rare cases where a fundamental miscarriage of justice results from the jury's receipt of a distorted picture of the defendant's culpability. The victim of a fundamental miscarriage of justice is not asking the court to review the rationality of a jury's interpretation of the evidence properly before it, but is asserting that, because of a constitutional violation, the evidentiary record presented to the jury fundamentally misrepresented the facts bearing on his guilt or sentence.

This distinction is reflected in the different inquiries that the Court has prescribed in *Jackson* and the miscarriage of justice cases. *Jackson* is a record-bound inquiry.[33] On the other hand, the *Kuhlmann* inquiry contemplates review of evidence the jury did not, but should have, heard.[34] Drawing

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[33] "[T]he critical inquiry . . . must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318.

[34] The Fifth Circuit's abstract suggestion that such an inquiry would insult the integrity of the jury's deliberative process is untrue for two reasons. First, the inquiry into the issue of actual innocence, if established, would only result in a ruling on the underlying claim. Second,

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from a standard originally proposed by Judge Friendly,[35] the *Kuhlmann* plurality concluded that a proper inquiry into the question of actual innocence embraces "evidence tenably claimed to have been wrongly excluded or to have become available only after the trial. . . . " 477 U.S. at 454 n.17.

Another crucial distinction between an assessment of the sufficiency of the evidence under *Jackson* and an assessment of actual innocence under *Kuhlmann* concerns the standard of review employed with each analysis. *Jackson* asks whether any rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The *Kuhlmann* inquiry focuses on whether there is a probability that, absent the error, the jury "would have entertained a reasonable doubt about guilt." 477 U.S. at 454 n.17.

The *Jackson* sufficiency test is itself an eligibility test, asking whether the defendant was entitled, as a matter of law, to a directed verdict of not guilty. *Kuhlmann*, of course, sets forth no such standard. The issue in *Kuhlmann* is, where significant new evidence is placed in the record, whether the fact finder would have entertained a reasonable doubt about

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because claims of actual innocence involve only constitutional errors which result in the presentation of false facts or the preclusion of true facts, the integrity of the deliberative process would be promoted by evaluating what the jury would have done had it been aware of the inaccurate evidence. In this case, for instance, Juror Cacioppo indicated during voir dire that he would look favorably on an intoxication defense only in one situation: "I think for somebody to do that they would have to have a very low IQ." TR 704, 712. Due to a serious violation of Sawyer's right to effective assistance of counsel, Juror Cacioppo heard no evidence that Sawyer is mentally retarded. Under these circumstances, an inquiry into the impact such evidence would have had on the jurors' deliberations would promote the integrity of the deliberative process.

[35] Friendly, *Is Innocence Irrelevant: Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970).

guilt, *not* whether the petitioner would have been entitled to a directed verdict.[36] 477 U.S. at 455 n.17.

The Courts of Appeals applying the "actual innocence" exception have looked not to whether the error would have rendered the petitioner ineligible for an adjudication of guilt, but whether the new evidence would have made a difference in the verdict. *See, e.g., Henderson v. Delo*, 926 F.2d 706, 713 (8th Cir. 1991) ("The actual innocence exception applies in this case if a jury considering the evidence presented to the district court probably would not convict Henderson of capital murder"); *Jacks v. Duckworth*, 857 F.2d 394, 400 (7th Cir. 1990) ("While the exact contours of the 'colorable showing of factual innocence' standard have yet to be precisely defined, it appears that Jacks has made such a showing in this case . . . both his claims of constitutional error go to issues directly related to the jurors' consideration of his insanity defense").[37]

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[36] The Fifth Circuit's confusion concerning the *Jackson* and *Kuhlmann* standards may have arisen from its reliance on the majority opinion in *Johnson v. Singletary*. The *Johnson* Court, over two strong dissents, held that "a defendant is innocent of a crime *only if he is ineligible for an adjudication of guilt* . . . " 945 F.2d at 1182 (emphasis added). "A properly convicted defendant's claim to innocence in the sentencing context is *likewise tied to eligibility*." *Id.* at 1183 (emphasis added). *See also id.* at 1184.

[37] The Fifth Circuit's view is also contrary to Judge Friendly's proposal, the real "foundation" for the *Kuhlmann* test. The architect of the "actual innocence" requirement simply did not contemplate a test that assesses only whether a petitioner is eligible for an adjudication of guilt. Rather, Judge Friendly promoted a requirement that the factual error raise serious concerns about the petitioner's guilt. "In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some *shadow of a doubt on his guilt*." Friendly, *supra*, at 142, quoting *Kauffman v. United States*, 394 U.S. 217, 235-236 (Black, J., dissenting). *See also, United States v. Miller*, 411 F.2d 825 (2d Cir. 1969), "[f]or an example that would have met this criterion if it had arisen by way of collateral attack. . . . " Friendly, *supra*, at 142. *Miller* illustrates that Judge Friendly did not contemplate the sort of eligibility test promoted by the Fifth Circuit. Miller's conviction was

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In sum, both the Fifth and Eleventh Circuit's conception of death-eligibility as a formulation of death-innocence is a result of a fundamental misreading of *Kuhlmann* and a misunderstanding of the nature and purpose of the Court's miscarriage of justice doctrine.

C. The Fifth Circuit's Eligibility Test Bespeaks A Misunderstanding Of The Court's Precedents Defining The Nature And Structure Of Penalty Phase Proceedings.

1. *Bullington v. Missouri* Does Not Provide Authority For The Fifth Circuit's Test.

The Fifth Circuit suggested that this Court's opinion in *Bullington v. Missouri*, 451 U.S. 430 (1981), informed the Court's resolution of the miscarriage of justice claim in *Smith v. Murray*:

> We think that this Court's willingness in *Smith* to consider Smith's claim that he was actually innocent of his death sentence is premised on the distinction that the court drew in *Bullington* between a death sentence and other sentences, and that distinction informs our view as to the content of the standard we set forth today.
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> * * *

See Bullington, 451 U.S. at 439, 101 S.Ct. at 1858 (distinguishing a death sentence proceeding from

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reversed on direct appeal due to "the Government's failure to disclose to the defense the pre-trial hypnosis of its principle witness, in part by the attorney who examined him at trial." 411 F.2d at 827. Independent, unchallenged circumstantial and direct evidence corroborated the testimony of the hypnotized witness. Nevertheless, Judge Friendly viewed the new evidence as sufficient to establish a colorable showing of actual innocence. *Miller* indicates that Judge Friendly was concerned with the credibility of the prosecution's case, not whether the new evidence cast doubt on the defendant's eligibility for an adjudication of guilt. Without a doubt, the hypnosis evidence would not have entitled Miller to a directed verdict of acquittal.

> other sentencing procedures in which there is "no separate sentencing proceeding at which the prosecution [is] required to prove – beyond a reasonable doubt – additional facts in order to justify the particular sentence.")

945 F.2d at 819-820.[38]

Indeed, in *Bullington*, this Court did distinguish between capital and non-capital sentences, but not in the mechanistic manner suggested by the Fifth Circuit. Rather, this Court's opinion in *Bullington* demonstrates that the central issue in a capital sentencing proceeding is not simply whether the prosecution can prove the existence of a statutory aggravating factor, but whether it can prove that death is an appropriate punishment.

Bullington held that the Double Jeopardy Clause does not tolerate imposition of the death penalty following a second capital trial where the first trial resulted in a life sentence. The Court recognized that double jeopardy ordinarily has no vitality in a resentencing context, since sentencing proceedings are typically free of substantive control or guidance. However, the Court found that the Missouri capital sentencing procedures[39] so resembled a trial on the issue of guilt or innocence that the jury was required to determine whether the prosecution "proved its case."[40] 444 U.S. at 451.

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[38] *Bullington* is not cited in the Court's opinion in *Smith v. Murray*.

[39] "The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice." 451 U.S. at 438. This observation applies to Louisiana's capital sentencing scheme as well. La. Code Crim. Proc. Ann. Art. 905.2 (West 1984).

[40] The Court's decision in *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984), reviews the elements of a capital proceeding which liken it to a trial:

> The discretion of the sentencer . . . is restricted to precisely two options: death, and life imprisonment. . . . In addition, *the*

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In *Poland v. Arizona*, 476 U.S. 147, 153 n.3 (1986), this Court specifically held that a prosecutor's burden at a capital sentencing proceeding is to prove that the defendant deserves the death penalty: "The 'case' to which the Court referred in *Bullington* was the prosecution's case that *the defendant deserved the death penalty*."[41]

The appropriateness of the sentence, then, and not proof of an aggravating factor, is the central consideration in a capital sentencing proceeding. "*Bullington* indicates that the proper inquiry [regarding 'acquittal'] is whether the sentencer or reviewing court has 'decided that the prosecution *has not proved its case' that the death penalty is appropriate*." *Id.* at 155 (emphasis added). *See also, id.* at 156 (sentencer's finding of any particular aggravating circumstance "does not of itself 'convict' a defendant (i.e., require the death penalty)"); *Rumsey*, 467 U.S. at 211 (sentence of life imprisonment "undoubtedly an acquittal on the merits of *the central issue in the proceeding – whether death was the appropriate punishment* for the respondent's offense") (emphasis added).

The Court's decisions in *Bullington*, *Poland*, and *Rumsey* reveal that capital sentencing proceedings are distinguished

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> *sentencer is to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembles a trial.* Finally, the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. . . . *for these reasons*, when the Missouri sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case.

(emphasis added).

[41] "The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent." The Court emphasized that the sentencer was required to make a choice between "two alternative verdicts . . . a statement inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of mini-verdicts on each aggravating circumstance." *Id.*

from non-capital sentencing proceedings not simply because the prosecution must prove an aggravating factor, but because the prosecution must prove that death is the appropriate punishment during a proceeding structurally similar to a guilt-innocence trial. Proof of an aggravating factor is but an initial step[42] toward the determination of "the central issue in the proceeding – whether death [is] the appropriate punishment. . . . " *Rumsey*, 476 U.S. at 211. The Fifth Circuit's eligibility test fails to comport with this Court's precedents because it does not even purport to assess the impact which the underlying constitutional error had on the central issue – whether death is the appropriate sentence.

2. The Fifth Circuit's Eligibility Test Fails To Recognize That This Court Has Developed Objective Standards To Evaluate The Impact Of Penalty Phase Error.

The Fifth Circuit complained that "if we were to entertain a claim based on mitigation evidence, we would be compelled to scrutinize the jury's deliberative process. . . . " 945 F.2d at 823 n.18. Further, the Fifth Circuit suggested that jury discretion is foreign to any proceeding except the penalty phase of a capital murder case, implying that such scrutiny would be difficult, if not impossible.

The Fifth Circuit's concerns are plainly unfounded. There is simply no difficulty assessing the impact of penalty phase errors in various contexts.[43] Furthermore, in another context, this Court *has* developed objective standards for assessing the

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[42] This is clearly the case under Louisiana's capital sentencing scheme. "[T]he finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." *Sawyer v. State*, 442 So.2d 1136, 1139 (La. 1983).

[43] *See e.g., Satterwhite v. Texas*, 486 U.S. 249 (1988) (impact of erroneous admission of aggravating psychiatric testimony evaluated under harmless error test); *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (erroneous admission of invalid conviction required re-examination of death sentence since its admission was possibly "decisive").

impact of penalty phase error which focuses on the consideration of aggravating and mitigating circumstances. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("the question is whether . . . absent the errors, *the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death*") (emphasis added).[44] Finally, "[a]lthough it is true that the [issue of whether mitigating circumstances outweigh aggravating circumstances] is dependent on discretion, this is certainly also true of other substantive offenses as well. For example, the difference between voluntary manslaughter and murder often turns on the fact finder's discretion with respect to whether sufficient provocation exists." *Johnson v. Singletary, supra*, 938 F.2d at 1198 (Anderson, J., dissenting).

D. The Fifth Circuit's Eligibility Test Ignores The Eighth Amendment's Core Concern Of Individualized Consideration.

The Fifth Circuit's test is suitable only to a scheme which mandates the death penalty upon a conviction for a capital offense, for the concept of eligibility implies that any member of a legislatively defined death-eligible class is necessarily deserving of death. However, the Court has invalidated mandatory statutes as violative of the Eighth Amendment since they "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." *Sumner v. Shuman*, 483 U.S. 66, 74-75 (1987) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). *See, Roberts (Harry) v. Louisiana*, 483

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[44] The lower courts have encountered no difficulty in applying the *Strickland v. Washington* test in assessing the impact of ineffective penalty phase representation. *E.g, Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (failure to document psychiatric hospitalization was deficient and prejudicial); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986) ("Brogdon makes no showing that he was prejudiced in any way by the failure to present this cumulative testimony").

U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality recognized that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a sentence less than death." *Id.* at 604 (emphasis in original). "As the Chief Justice explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

Eligibility not only ignores, but insults, the rule of *Lockett*.[45] Eligibility validates the Eighth Amendment's threshold narrowing requirement, but not its central requirement of individualized consideration. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879-880 (1983) (emphasis in original).

The concept of death-eligibility vastly exaggerates the relationship between a valid aggravating circumstance and the accuracy of a death sentence, as this case vividly illustrates. Robert Sawyer entered his penalty phase *after* the narrowing function had been performed, for under Louisiana law this process occurs at the guilt stage.[46] "There is no question but that the Louisiana scheme narrows the class of death-eligible

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[45] The Fifth Circuit acknowledges that its test "emerges from the same fundamental concerns discussed by the *Johnson* en banc majority." 945 F.2d at 820-821 n.15. *Johnson* scorns the notion of individualized consideration and lampoons the rule of *Lockett*: "In *Lockett* . . . the Court did not merely tolerate discretion, but mandated it!" 938 F.2d at 1180.

[46] Thus, in Louisiana, one who is ineligible for a death sentence is also ineligible for a conviction of first degree murder. *See* La. Rev. Stat. Ann. 14:30 (West 1986) and La. Code Crim. Proc. Ann. Art. 905.4 (West 1984).

murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." *Lowenfield v. Phelps* 484 U.S. 231, 246 (1988). And certainly, the Constitution requires *no less*. Nor does Louisiana law, which respects the rule of *Lockett* by providing that "[t]he sentencing hearing shall focus on the circumstances of the offense and *the character and propensities of the offender*." La. Code Crim. Proc. Ann. Art. 905.2 (West 1984) (emphasis added). "[T]he finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." *Sawyer v. State*, 442 So.2d at 1139 (emphasis in original).

In Louisiana, the real death selection process occurs at the penalty phase, where "the jury is asked to scrutinize the defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed." *Sawyer*, 442 So.2d at 1140. "[Article] 905.2 makes it clear that *the character of the defendant is one of the two most relevant factors* with which the sentencing hearing should be concerned." *Id.* (emphasis added). Only after presentation of mitigating evidence can a jury properly assess an offender's moral culpability and determine whether one who is *eligible* to die is also *deserving* of execution. As a touchstone of innocence, eligibility fails because it refuses to acknowledge the crucial role mitigation evidence plays in any constitutional death sentencing scheme.[47] The Fifth Circuit's eligibility test will *only*

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[47] Due to its infirmities as a true remedy for victims of miscarriages of justice, the eligibility test will doubtless produce anomalous result. *Johnson*, 938 F.2d at 1198 n.4 (Anderson, J., dissenting) (one made death-eligible by a conviction for felony murder at the guilt stage will never be relieved from procedural default or writ abuse regardless of nature and extent of penalty phase error, "even if every prosecution witness at the sentencing phase lied on the witness stand or every statutory mitigating factor . . . was supported by actual fact but had not been presented by incompetent counsel"). Both the Eighth and Ninth Circuits have formulated miscarriage of justice standards more consistent with the rule of *Lockett* and the equitable principles which govern the

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consistently protect those who *could not* have been sentenced to death but will not protect those who *would not* have been sentenced to death but for a fundamentally distorted sentencing profile. Because "a consistency produced by ignoring individual differences is a false consistency," *Eddings*, 355 U.S. at 112, eligibility is incapable of protecting true victims of miscarriages of justice.

III. THE REFUSAL OF THE LOWER COURT TO REVIEW THE MERITS OF MR. SAWYER'S CLAIMS OF CONSTITUTIONAL ERROR WILL RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE; HE IS ENTITLED TO A HEARING TO DETERMINE WHETHER HIS CONVICTION AND SENTENCE OF DEATH VIOLATE THE CONSTITUTION.[48]

A. Mr. Sawyer's False Sentencing Profile Distorted And Perverted The Fact Finding Process.

It cannot be denied that the Mr. Sawyer's sentencers heard false and misleading evidence about his mental state.

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Writ of Habeas Corpus. *Deutscher v. Whitley*, 946 F.2d 1443 (9th Cir. 1991); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1990); *Smith v. Armontrout*, 888 F.2d 530, 545 (8th Cir. 1989).

[48] Assuming, but not conceding, the Fifth Circuit's proposed test is proper, that court failed to properly apply state law in its analysis. The Louisiana Supreme Court is obligated to review a sentence of death for arbitrariness, sufficiency of the evidence, and proportionality. Rules of the Supreme Court of Louisiana, Rule 28(1). While noting that a "trier of fact" can be an "appellate court," 945 F.2d at 820 n. 13, the Fifth Circuit failed to recognize the state supreme court's obligation on direct appeal.

An example of the state court's review is found in *State v. Sonnier*, 380 So.2d 1 (La. 1979). On direct appeal, the court found sufficient evidence to uphold the six aggravating circumstances found by the jury in support of its verdict of two death sentences. The mitigation consisted of Sonnier's state of mind at the time of the offense and his scant criminal record. Under its obligation, to determine whether the jury "disregard[ed]

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Nor can it be denied that the false and misleading evidence caused the sentencers' deliberations to be perverted.

The true evidence about Mr. Sawyer's mental condition and childhood history provide clear explanations for understanding his violent actions. The sentencers, however, were precluded from learning that Mr. Sawyer's mental handicaps prevented him from "comprehend[ing] that the increasingly destructive physical abuse of the victim would lead to her death." JA 545. The error prevented Mr. Sawyer from developing psychiatric defenses which would have caused at least one sentencer to reject the death penalty.[49] His true character was absent from the fact finding process thereby undermining that process and foreclosing a correct understanding of his true culpability.

1. Mr. Sawyer's Jury Heard That He Is A Sociopath.

Mr. Sawyer's trial counsel knew well in advance of trial that he had been previously treated in a psychiatric hospital and had been placed in special education classes as a child.[50]

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numerous and persuasive mitigating circumstances that clearly outweigh [the] aggravating circumstances," the supreme court reversed the death sentence.

In order to accurately determine whether the sentence in this case is proper under state law, the lower court should have remanded the case to the state supreme court in order for that court to perform its review under Rule 28 in light of all the evidence proffered in the habeas petition.

[49] In Louisiana, if one juror determines a death sentence is "inappropriate," a life sentence results. La. Code Crim. Proc. Ann. Art. 905.6 (West 1984); *see e.g. State v. Loyd*, 459 So.2d 498, 503 (La. 1984).

[50] *See*, sanity commission reports at JA 341-346. Pursuant to La. Code Crim. Proc. Ann. Arts. 643 and 644 (West 1984), the trial court appointed two doctors to a sanity commission to determine whether Mr. Sawyer was competent to stand trial. The doctors based their findings solely on brief interviews where Mr. Sawyer reported that he had been in a psychiatric hospital and in special education classes. *Id.*

Further, trial counsel believed that Mr. Sawyer would definitely be found guilty.[51] Nevertheless, trial counsel pursued one ill-conceived and poorly planned strategy – a guilt phase defense of "toxic psychosis." In support of this defense, counsel called the two sanity commission members.

Dr. Arneson testified on direct examination that her diagnosis of Mr. Sawyer was, "Probable sociopathic personality." JA 472. When examined by the prosecutor, she testified:

> A. A sociopathic personality is an individual who has for whatever reason, we really don't know why they have difficulties incorporating a super ego consciousness and they are, they will do anything without any feeling of guilt or remorse, do whatever they think they can get away with. . . .
>
> Q. . . . It says you testified at a hearing in this Court on June the 12th, 1980. We asked what a sociopathic personality was and you said these individuals have great problems in terms of super-ego, by that I mean conducting themselves according to the rules of society. They are usually very impulsive to which they do what they feel like doing. They have low frustration tolerances, no guilt or feelings of guilt. If they do perform some act that is in opposition to society, that type of thing, that would be an accurate statement?
>
> A. Yes. [JA 478-479].

She further testified that sociopaths are aware of what is right or wrong, have very little guilt, and will "blow[ ] another person's brains away" to silence the witness to a crime. JA 480. Her testimony implied that Mr. Sawyer was a sadist, and she described a sadist as one "who gets sexual pleasure or satisfaction from torturing or making other people suffer pain." JA 480-481.

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[51] At the 1985 state hearing, counsel stated that the nature of the state's evidence was "Overwhelming. It was – I never had any delusions in this case about, you know, Mr. Sawyer being found not guilty. So you know, I mean it really came down to two things, I mean what was I going to tell these people; *how could I try to mitigate*." SH 129 (emphasis added).

Dr. DeVillier testified that the crime was committed by a person who was more likely than not a sociopath. JA 465. On cross-examination, Dr. DeVillier described sociopaths as those who are "constantly in trouble with the law. . . . " JA 463. Dr. Devillier thought Sawyer to be a sociopath "in various degrees." JA 464.

He also testified that a sadist enjoys inflicting pain on others and that a sadist may also be considered antisocial. JA 465. This area of cross-examination concluded with the witness suggesting that Mr. Sawyer is a sadist, and stating "it is possible" that Mr. Sawyer achieved "orgasmic feelings" without "active intercourse" as sadists often do. JA 465-467.[52]

Thus, the jury heard that (i) Mr. Sawyer is a sociopath; (ii) he is possibly a sadist; (iii) a sociopath does not have a conscience, does not feel guilt or remorse, is not concerned with the pain and suffering of others, will "blow another person's brains away" to avoid detection, and does not care about the morals of society; and (iv) a sadist is a warped individual who enjoys inflicting pain on others in order to achieve sexual gratification.

Counsel repeated this inaccurate diagnosis during summation at the penalty phase:

> I don't know what I can say for Robert Sawyer. He is a poor miserable human being. He has had a hell of a life. He was involved in a very heinous act. He has been in a mental hospital. *Like Doctor Arneson*

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[52] The prosecutor exploited this description in closing argument: "*Robert Sawyer a sociopathic individual, a man who has no conscience*, who knows and intends what he does but doesn't care about the results of his actions like most criminals according to Doctor Devillier and Doctor Arneson beat and tortured Frances Arwood and *got off to it*." TR 1451 (emphasis added).

told you probably a sociopath. [JA 535. (emphasis added)].

2. Mr. Sawyer Is Not A Sociopath. He Suffers From Organic Brain Damage And Mental Retardation.

The district court was presented with records from Mr. Sawyer's prior mental health treatments and recent mental health evaluations. These documents show that Mr. Sawyer is neither a sociopath nor a sadist and that he has never been diagnosed as being a sociopath except by Dr. Arneson.[53]

At age fourteen, Mr. Sawyer began treatments at the Gailor Mental Health Clinic, where he was diagnosed as being "*moderately retarded, chronic brain syndrome* manifested by moderate retardation and abnormal EEG." JA 538. From February, 1965 to December, 1966, he was continually treated with anti-psychotic medications.

In June, 1966, Mr. Sawyer was committed to the psychiatric ward of John Gaston Hospital. R 181. Unsuccessful attempts were made to commit him to the Western State Hospital and he was discharged back to the Gailor Clinic. His diagnosis remained the same as determined at the Gailor Clinic. R 188.

On August 16, 1966, Mr. Sawyer was adjudicated incompetent by the Probate Court of Shelby County, Tennessee (R 204), and committed to the Western State Psychiatric Hospital. He was provisionally diagnosed as "mental deficiency, idiopathic, mild with psychotic reaction," and was treated with electroconvulsive therapy. R 217. He was discharged five months later with a diagnosis of "Schizophrenic reaction,

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[53] Dr. Arneson testified at the competency hearing that her diagnosis of "probable sociopathic personality" could not be more definite without a full evaluation, noting that she would need a more reliable history. She stated that she did not think Mr. Sawyer suffers from brain damage. TR 442. She also declined to order a "brain scan," reporting that it would not "determine lack of mental capacity or the extent of mental capacity." JA 343.

childhood type." JA 540. Within three weeks, Mr. Sawyer was adjudicated incompetent. JA 540.

Recent evaluations, submitted to the district court, are consistent with the earlier diagnoses. Dr. Whyte, a psychiatrist, diagnosed Mr. Sawyer as suffering from Organic Personality Syndrome (formerly Chronic Brain Syndrome) and Mild Mental Retardation. JA 548. Dr. Devinsky[54] reports that "Mr. Sawyer's neurological examination confirm[s] global cognitive impairment and specifically point[s] to evidence of prefrontal dysfunction." JA 544. A Magnetic Resonance Imaging brain scan revealed abnormalities[55] which further "supports the diagnosis of trauma-induced frontal lobe injury." JA 547. Dr. Fisher, a psychologist, administered a series of psychological, neurological and intelligence tests to Mr. Sawyer and found "considerable indicators of both neurological dysfunction (brain damage) and a mild level of mental retardation (current full-scale IQ measured 68)." JA 566. Dr. Fisher emphasized that any diagnosis of psychopathic trends should not have been made for [Mr. Sawyer] . . . without previously ruling out the possibility of brain damage." JA 568.

Mr. Sawyer's brain damage is located in the frontal lobes. "The prefrontal areas play an important role in controlling basic drive functions such as sexual and aggressive thoughts and actions. Prefrontal brain injury results in an inability to inhibit and control aggressive thoughts and actions. It affects the decision-making process: impulsive action precedes measured consideration." JA 544-545. The forensic relevance of frontal lobe damage is that:

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[54] Dr. Devinsky is the Chief of the Department of Neurology and Director of the Comprehensive Epilepsy Center at the Hospital for Joint Diseases, and Associate Professor of Neurology at New York University. JA 541.

[55] "The MRI shows a small punctate focus of increased proton density in the subcortical white matter of the medial left frontal lobe. . . . Furthermore, there is a signal void on both the T1 and T2 weighted images in the superior sagittal sinus, consistent with thrombosis." JA 546.

> Robert's behavioral symptoms fall mainly in the characteristic area of poor impulse control with regard to hyper-aggressive and hyper-sexual impulses. . . . [JA 552]. The impulsive aspect of Robert Sawyer's behavior in response to emotional interpersonal situations or to his own aggressive and/or sexual mood occurs with minimal, if any, intellectual reflection. Any experiences such as moral culpability, consideration for others involved or any understanding of the generalized significance of his behavior is lacking regardless of outward appearances. His behavior in response to emotional signals is akin to a reflex arc having perhaps ritualistic but not truly rational significance. [JA 555].

Organic Personality Syndrome, "complicated by mild mental retardation, has seriously compromised, and continues to compromise, [Mr. Sawyer's] capacity for reflective behavior," JA 556, to such an extent that his "aggressive impulses dominated his behavior for a period of time during which he could not comprehend that the increasingly destructive physical abuse of the victim would lead to her death." JA 545.

Both Drs. Whyte and Devinsky reported that the likely etiology of Mr. Sawyer's brain damage and dysfunction is childhood head trauma suggestive of severe physical abuse.[56]

> His history is also remarkable for several episodes of significant head trauma with loss of consciousness for periods of between 45-120 mins. At

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[56] Dr. Whyte's review of Mr. Sawyer's medical records noted the cause of head trauma as "alleged" because "Although Robert's father and grandmother related these events to various medical personnel over several years, I have expressed the reservation ("alleged") because there exists here a pattern of early life trauma suggestive of severe physical abuse. For example, (1) no medical attention was sought for the above-mentioned comatose states; (2) somewhat suspicious explanations of prolonged unconsciousness are offered (falling from a *bicycle* at *age 5*; a fight with another boy in later childhood); a history of other early-life trauma (broken arm at age 4); and, finally the history given by Robert and other family members of frequent, often severe, beatings by his father." JA 551.

> age 5 years he fell off a bicycle and was unconscious for approximately 2 hours. At age 15 years he states he was kicked in the head by a horse and was unconscious for an unknown duration (one medical report states 2 hours) but first recalled events in the hospital approximately 60 hours later (corresponding to the period of post-traumatic amnesia). At age 21 years he was in a motor vehicle accident and sustained head trauma with loss of consciousness for approximately 2 hours. He lost his left eye in the accident. At age 25 years he was struck in the head by a car jack and suffered a loss of consciousness lasting 45 minutes and a 2 inch laceration on his upper forehead near the midline, with a residual scar.
>
> In addition, a family member reports that Mr. Sawyer's mother attempted to suffocate him- . . . when he was 3 months old . . . Suffocation with lack of oxygen to the brain may be the cause of Mr. Sawyer's mental retardation and neurological behavioral disorder.
>
> Other records reveal . . . [and] Mr. Sawyer states that he received 3 shock treatments per day for a period of one month. . . . this therapy may have caused brain injury. [JA 542].
>
> Although brain damage could be the result of a prenatal event or neonatal anoxia, the history most strongly suggests a post-concussion etiology following single or repeated head trauma. [JA 551].

3. Mr. Sawyer's Jury Heard False And Misleading Reasons For His Prior Hospitalization; In Fact, He Was Committed After Being Adjudicated Mentally Ill And Incompetent.

A brief reference to one of Mr. Sawyer's prior hospitalization was made by his sister, Glenda White, at the penalty phase.

> "Because of his running away . . . they put Robert in the state mental hospital for no reason and they gave him drugs. Well, I don't know what they were. .

> I know they kept him where you just sat around and didn't give anybody any trouble. You didn't have any energy to get up and walk around. When he resisted taking those drugs they gave him shock treatments as punishment and he stayed there until he got out to get away and he took off from there and went to Chicago." [JA 509-510].

Thus, the jury heard false and misleading reasons to explain this one, uncorroborated reference to Mr. Sawyer's psychiatric treatments. The jury learned that he was hospitalized either because he was a sociopath[57], because he kept running away, or "for no reason."

The true reason why Mr. Sawyer was hospitalized was because authorities concluded that his behavior, manifested by brain damage and mental retardation, required involuntary treatment. Mr. Sawyer was treated at the Western State Psychiatric Hospital because on August 16, 1966 he was "declared and adjudicated mentally ill and incompetent." R 204. The court ordered him to be committed to the hospital.

Further, although the jury did not learn about other mental health treatments, Mr. Sawyer was committed to the psychiatric unit of the John Gaston Hospital; he was "brought in on lunacy warrant" initiated by the juvenile court. R 181.

4. Mr. Sawyer's Jury Did Not Hear The True Facts About His Childhood; In Fact, His Childhood Is A Tragic Story Filled With Abuse.

Trial counsel effectively placed the whole case of mitigation in the hands of Glenda White. White's testimony, however, fell woefully short of establishing the true, compelling story of Mr. Sawyer's childhood experiences, a story of frailty that could and should have been presented with other lay and expert witnesses and readily available documents.

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[57] Defense counsel told the jury: "He was in a mental hospital. Like Dr. Arneson told you probably a sociopath." JA 535.

White mentioned that her mother's suicide caused Mr. Sawyer's twin sister to be given away to an aunt, and described her father as being a strict disciplinarian who instilled the value of hard work in Mr. Sawyer. JA 506-507. She noted that the father's character and needs of the family farm prevented Mr. Sawyer from engaging in normal childhood recreation. JA 507-508. She noted that when Mr. Sawyer entered adolescence, she married and left the household. JA 507. The jury learned that Mr. Sawyer had a propensity for running away from home and "they put Robert in the state mental hospital for no reason." JA 509. White closed by discussing Sawyer's nonviolent, caring nature and his Arkansas conviction. JA 515-516.

Mr. Sawyer's aunts have a much better understanding of his difficult childhood than White. Each has witnessed the cruelty of the father towards Mr. Sawyer's mother and Mr. Sawyer. They would have testified that Mr. Sawyer's father abused and raped his mother to such an extent that they believe she committed suicide in order to escape his torture. They would have testified that the father's relentless physical and emotional abuse made petitioner into a lonely, withdrawn, confused child without any self-confidence. JA 569-584.

5. The Evidence Of Brain Damage, Mental Retardation, And Tragic Childhood Shows That The Jury Would Not Have Sentenced Mr. Sawyer To Death.

It is clear that courts consider evidence tending to diminish the culpability of the defendant based upon mental state as the most important mitigation evidence. Mental health evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988)). Such evidence not only acts to reduce the personal and moral culpability of a defendant, "it also can significantly weaken the aggravating factors." *Id.* (citation omitted).

In Louisiana, "[t]he jury is asked to scrutinize defendant's character to ascertain whether the offender and the

offense fit the statutory scheme for those whom the death penalty has been designed." *Sawyer v. State*, 442 So.2d 1136, 1140 (La. 1984); La. Code Crim. Proc. Ann. Art. 905.2 (West 1984). Because "the finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process," (*id.* at 1139 (emphasis in original)), "the jury [must] receive adequate and *accurate* information regarding the defendant['s]" character. *State ex rel. Busby v. Butler*, 538 So.2d 164, 172 (La. 1988) (emphasis added). Accurate mental state evidence is crucial in determining whether the offender's culpability makes him deserving of death.

Defense counsel's incompetence foreclosed the meaningful exploration and presentation of psychiatric defenses which would have significantly weakened the effect of the state's penalty phase evidence.[58] The state presented evidence of Mr. Sawyer's prior involuntary manslaughter conviction,[59] and argued that the instant crime was "committed in an especially heinous or cruel manner." La. Code Crim. Proc. Ann. Art. 905.4(g) (West 1984). The psychiatric defenses available to Mr. Sawyer would have allowed him to present an explanation of the aggravating evidence. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977) (defendant is entitled the "opportunity to deny or explain" aggravating evidence). An explanation as to how Mr. Sawyer's brain damage and mental retardation affects his behavior would have rebutted the impact of the state's evidence.

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[58] The true mental condition of Mr. Sawyer would have established at least two statutory mitigating circumstances regarding mental state. *See* La. Code Crim. Proc. Ann. Art. 905.5(b) and (c) (West 1984).

[59] Mr. Sawyer pled not guilty to a charge of second degree murder in Pulaski County, Arkansas in 1974. The case was "submitted to the Court and after hearing the testimony of the witnesses, the charge [was] reduced to Involuntary Manslaughter." State's Penalty Phase Exhibit 1, at 3. This aggravating factor was reversed on direct appeal. *State v. Sawyer*, 442 So.2d at 101 On remand, the court held that the prior conviction was lawfully introduced due to the statutory requirement that the jury focus on the character of the defendant. *Sawyer v. State*, 442 So.2d 1136 (La. 1984).

Absent the error, the jury would have been told that Mr. Sawyer's mental handicaps prevented him from "comprehend[ing] that the increasingly destructive physical abuse of the victim would lead to her death." JA 545. His ability to anticipate the consequences of his actions and to control his impulsivity due to brain damage is aggravated by his mental retardation. The two conditions have "seriously compromised . . . [his] capacity for reflective behavior." JA 556. Mr. Sawyer's disabilities would have provided meaning to a seemingly unexplainable event.[60]

A diagnosis of mental retardation requires the person to have a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and requires that the disability must have been "manifested during the developmental period." American Association on Mental Retardation, *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).[61] Persons with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Learning Center*, 473 U.S. 432, 442 (1985).[62] Mr. Sawyer's "reduced ability" is found in every dimension of his cognitive and behavioral functions, "including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation."

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[60] In 1990, the Court began its description of the facts of this case with the observation that Sawyer participated in harming Arneson "[f]or reasons that are not clear." *Sawyer v. Smith*, ___ U.S. ___, ___, 110 S.Ct. 2822, 2825. Mr. Sawyer's proffered evidence of his mental disabilities provides clear explanations for his actions.

[61] The term "general intellectual functioning" refers to the results of intellectual testing; the term "adaptive behavior" refers to an "individual's effectiveness in meeting societal standards of maturation, learning, personal independence and/or social responsibility that are expected for his or her age level and cultural group." *Id.*

[62] *See generally*, R. Conley, R. Luckasson and G. Bouthilet, *The Criminal Justice System and Mental Retardation*, (1992); R. Perske, *Unequal Justice?*, (1991).

Penry v. Lynaugh, 492 U.S. 302, 345 (1989) (Brennan, J., concurring in part, dissenting in part, citing Brief of *Amici Curiae* American Association of Mental Retardation, *et al.*, 6). Among the many impairments resulting from mental retardation, the most serious occur in logical reasoning, strategic thinking, and foresight.[63] Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982). Mr. Sawyer's ability to anticipate the consequences of his actions is grossly impaired due to his subnormal intellectual skills and gross deficits in his adaptive behavior.

There is a "belief, long held in this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). A jury assessing punishment must be made aware of the defendant's mental state at the time of the crime because such evidence reflects the degree of moral culpability and blameworthiness. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 135, 156 (1987) ("A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime").

Mr. Sawyer's crippling mental disabilities were richly documented prior to his trial, but counsel failed to obtain any such evidence even though he knew his client had been in a mental hospital. Instead, counsel presented evidence that Mr. Sawyer had been in a mental hospital "for no reason." And instead of presenting evidence of Mr. Sawyer's mental retardation and brain damage, counsel promoted a highly inaccurate and extremely prejudicial diagnosis of sociopathy. Counsel's ineffectiveness both "precluded the development of

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[63] Mr. Sawyer has a "prominent, specific defect in information processing, namely, an inability, or severely impaired ability, to perform abstract thinking, to make generalizations or to understand abstract concepts." JA 554.

true facts and resulted in the admission of false ones. . . . " *Smith v. Murray*, 477 U.S. 527, 538 (1986). Counsel's conduct also "had the effect of foreclosing meaningful exploration of psychiatric defenses." *Id.* Because Mr. Sawyer would not have received a death sentence[64] but for the distorted picture of his culpability, he is actually innocent of the death penalty.

B. The State Prevented Mr. Sawyer From Presenting A Defense Of Factual Innocence By Suppressing Exculpatory Evidence.

The state's case against Mr. Sawyer revolved around the testimony of its star witness, Shano, and circumstantial evidence, a lighter fluid can bearing Mr. Sawyer's fingerprints. Shano's four year old son, Wayne, was present in the house at the time of the offense. Wayne was interviewed by Detective Livaudais the day after the arrest and told the detective that Mr. Sawyer did not set fire to the victim but rather Lane did. He also directed the detective to another can of lighter fluid, the one Mr. Sawyer alleges Lane used to set fire to the victim. This evidence was never revealed to trial counsel. Further undisclosed exculpatory evidence existed which would have destroyed Shano's credibility. Shano sold her testimony at trial for a promise that she would not be prosecuted.

Mr. Sawyer presented an affidavit of Diane Thibodeaux, a friend of Shano's, to the district court. Thibodeaux, known as "nanny" to Shano's children, comforted Wayne when he was questioned by Detective Livaudais the day after the crime. JA 586. Wayne told the detective that Lane put lighter fluid in a "shiny thing you put cigarettes in" and poured it over Arwood, then it "went poof." JA 587. Wayne said that "Daddy [Mr. Sawyer] tried to help the lady" but was knocked away by Lane and he fell into a chair. JA 587. Wayne also

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[64] This is true under the "fair probability" test, *Kuhlmann v. Wilson*, 477 U.S. 436, 455 (1986), or under the "more likely than not" standard urged by Judge Anderson. *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (*in banc*) (Anderson, J., dissenting).

showed the detective the garbage can where a lighter fluid can and cigarette case were found. JA 587.[65]

Mr. Sawyer also presented affidavits from Shano's friends and former mother-in-law exposing the grant of immunity given to Shano by the state. JA 591-592, 596-597, 603. Part of Shano's motivation for testifying was that she abused her children and was under investigation at the time by state authorities.[66] JA 605-608.

The Fifth Circuit ruled that the evidence presented in the habeas petition does not

> raise a fair probability that a rational trier of fact would have entertained a reasonable doubt as to whether to convict or sentence Sawyer to death. The specific facts that Sawyer now raises do not show that he is innocent either of the murder of Arwood or of both of the valid aggravating circumstances. . . . [Appendix A (per curiam correction to the third paragraph under Section II.E.) (footnotes omitted)].

The court erroneously reasoned that Mr. Sawyer could be found guilty as a principal if not the actual perpetrator of the arson. *Id.* at n.21.

The court is flat wrong in its understanding of state law. In order to be found guilty as a principal, the defendant must "knowingly participate in the planning or execution of a crime." *State v. Knowles*, 392 So.2d 651 (La. 1980); *State v. Holmes*, 388 So.2d 722, 727 (La. 1980) (intent cannot be imputed). Mere presence does not in any way rise to a knowing participation, planning or execution. In fact, the

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[65] The lighter fluid can entered into evidence by the state was seized on the day of the crime from the kitchen table. TR 1251.

[66] At trial the prosecutor asked Shano a rather innocuous and seemingly irrelevant question: "Have you tried to keep your children?" R 1204. The prosecutor was obviously aware that Shano had been under investigation by state authorities for abusing and neglecting her children since 1977. Nine months after the trial, Shano's children were placed in custody of the state and placed in a foster home. Subsequently, she lost all custody. JA 607.

evidence shows not only that Mr. Sawyer did *not* burn the victim, but rather *he tried to prevent Lane* from doing so. In light of his attempt to *prevent* the aggravated arson, a fair probability exists that the jury would not have found a specific intent to *commit* aggravated arson.[67]

The suppressed evidence of the grant of immunity to Shano also supports Mr. Sawyer's colorable showing of factual innocence. Had the jury learned that Shano sold her testimony in order to escape prosecution (and to "keep her children"), her credibility would have been highly questionable due to her bias and interest.

Mr. Sawyer is actually innocent of the death penalty. He has made a colorable showing of factual innocence of the crime. *Kuhlmann v. Wilson*. But for the suppression of exculpatory evidence, there is a fair probability that the jury would have entertained a reasonable doubt about Mr. Sawyer's guilt of first degree murder, and therefore he would have never entered the penalty phase. As noted *supra*, the jury found the existence of aggravated arson (and rejected the state's argument of aggravated rape) as the aggravating circumstance that made this murder a first degree murder.[68] A murder without specific underlying factors (e.g. other enumerated felonies and characteristics of the victim) is a second degree murder under Louisiana law. *See* La. Rev. Stat. Ann. 14:30 and 14:30.1 (West 1986).

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[67] However, even if the jury determined that Mr. Sawyer was a principal to the arson, the suppressed evidence would have established another mitigating circumstance: "The offender was a principal whose participation was relatively minor." La. Code Crim. Proc. Ann. Art. 905.5(g) (West 1984).

[68] Even under the proposed "eligibility" test, Mr. Sawyer need not challenge the existence of the penalty phase aggravating factor of "heinous, atrocious or cruel" because, under state law, by making a colorable showing of the absence of aggravated arson, Mr. Sawyer shows that he *was* ineligible for death, and at most, only eligible for a sentence of life imprisonment. La. Rev. Stat. Ann. 14:30.1 (West 1986).

CONCLUSION

For the above reasons, this Court should reverse the Court of Appeals' decision and remand this case for a hearing on the merits of Mr. Sawyer's claims of constitutional violations. Alternatively, should this Court uphold the Court of Appeals' proposed test, this case should be remanded to the federal district court for a hearing on the merits of the claim that the state withheld exculpatory evidence, and to the Supreme Court of Louisiana to determine whether Mr. Sawyer is "eligible" for the death penalty under state law, specifically, Louisiana Supreme Court Rule 28.

Respectfully submitted,

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APPENDIX A

La. Rev. Stat. 14:30 First degree murder

First degree murder is the killing of a human being:

(1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension

of sentence in accordance with the determination of the jury.

La. Rev. Stat. 14:30.1 Second degree murder

Second degree murder is the killing of a human being:

(1) when the offender has a specific intent to kill or to inflict great bodily harm; or

(2) when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

La. Code Crim. Proc. Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on

the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

La. Code Crim. Proc. Art. 905.4 Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious or cruel manner;

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant;

(i) the victim was a correctional officer or any employee of the Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney or district attorney's investigator.

La. Code Crim. Proc. Art. 905.5 Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

La. Code Crim. Proc. Art. 905.6 Jury; unanimous recommendation

A sentence of death shall be imposed upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Supreme Court Rule 28(1)

Rule 905.9.1 Capital Sentence Review (applicable to La. Code Crim. Proc. Art. 905.9)

Section 1. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

APPENDIX B

Robert Wayne SAWYER,
Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 91-3658

United States Court of Appeals,
Fifth Circuit

Nov. 12, 1991

Appeal from the United States District Court for the Eastern District of Louisiana; Henry A. Mentz, Jr., Judge.

Before KING, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

The third paragraph under Section II.E. of our opinion in *Sawyer v. Whitley*, 945 F.2d 812 No. 91-3658 (5th Cir. 1991), is deleted and the following is substituted therefor:

Nor does this evidence raise a fair probability that a rational trier of fact would have entertained a reasonable doubt as to whether to convict or sentence Sawyer to death. The specific facts that Sawyer now raises do not show that he is innocent either of the murder of Arwood[21] or of both of the valid aggravating

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[21] Saywer need not have been the actual perpetrator of the aggravated arson for a jury to find him guilty of that crime. *See* La.Rev.Stat.Ann. art. 14:24 (defining principals of a crime as all persons who aid and abet in the commission of a crime,

(Continued on following page)

circumstances[22] the jury found before recommending the death penalty.

(Continued from previous page)

whether directly or indirectly). He does not contend that he was not present while Frances Arwood was being burned. Furthermore, he does not deny that his fingerprints were found on a can of lighter fluid at the crime scene, a fact which the jury considered in finding aggravated arson.

[22] As recounted above, Sawyer beat and scalded Arwood with boiling water. *See also Sawyer v. State*, 442 So.2d 1136, 1140 (La. 1983) (pointing to "overwhelming evidence of the heinous nature of the principal offense" in affirming Sawyer's sentence). Nothing Sawyer adduces now contradicts the fact that he participated in torturing Arwood.